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No. 00-1260

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARK JAMES KNIGHTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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A. This Court's Analysis Of "Special Needs" Searches Of Probationers Does Not Preclude A State From Instituting A Consent-Search Condition To Supervise Probationers

Respondent contends (Br. 11-23) that under *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), any warrantless search of a probationer must "be a *probation* search, not an investigatory search conducted to further law enforcement interests." Resp. Br. 14. In respondent's view, a search of a probationer may be deemed to further a "special need" of the government, distinct from the general governmental interest in enforcement of the criminal law, only if the search is conducted by a probation officer whose duties include the rehabilitation

of the probationer as well as the protection of the public. See Resp. Br. 19-20. He therefore argues that the consent-search condition in this case is unconstitutionally broad. *Griffin*, however, does not undermine the constitutionality of California's decision to seek a probationer's consent to searches by any law enforcement officer as a means of assuring adequate supervision.

1. The Court in *Griffin* held that "[a] State's operation of a probation system * * * presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." 483 U.S. at 873-874. The Court explained that probation is imposed as a sanction for a criminal offense and is contingent upon the probationer's compliance with specified conditions—first among them the duty "to avoid commission of other crimes." *Id.* at 874. The Court concluded that the conditions of probation are designed to further the probationer's rehabilitation and to protect the community, and that "[t]hese same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed. * * * Supervision, then, is a 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id.* at 875.

In the *next* section of its opinion (see 483 U.S. at 875-880), the Court addressed the question whether the "special needs" of the State in administering its probation system justified the incursion on the probationer's liberty that a nonconsensual warrantless search entailed. In finding the search to be reasonable, the Court relied in part on the fact that the search was overseen not by a police officer, but by a probation officer "who, while assuredly charged with protecting

the public interest, is also supposed to have in mind the welfare of the probationer." *Id.* at 876. But while the identity of the searching officer was deemed relevant to whether the intrusion on privacy from the search was permissible, it played no part in the Court's determination that the "supervision" of probationers is a "special need" of the State distinct from normal law enforcement.

Griffin therefore does not support the effort, undertaken by the court of appeals (see Pet. App. 7a-10a) and embraced by respondent (see Br. 19-20), to distinguish for Fourth Amendment purposes between "probation" and "investigation" searches. The state interest underlying the search condition at issue in this case is to ensure that probationers—persons who have by definition been convicted of criminal offenses (see *Griffin*, 483 U.S. at 874) and who are presumptively "more likely than the ordinary citizen to violate the law" (*id.* at 880)—can be more closely monitored than other members of the population. That monitoring serves both to deter violations of the probation conditions and to detect violations that occur. Those objectives are served equally well whether the monitoring is done by law enforcement or probation officers.

Here, to facilitate supervision of probationers, the Sheriff's Department's records enabled law enforcement personnel to identify probationers subject to the search condition. See Resp. Br. 2, 22. The officer who conducted the search in this case was aware of respondent's probation status and of the search condition, and the officer reasonably suspected respondent of involvement in criminal activity. See Gov't Br. 3 & nn. 2-3. Because respondent's commission of new crimes would violate the most fundamental term of his probation, a search designed to confirm or dispel the

officer's suspicion directly served a core probation purpose. See Gov't Br. 27-28.

2. Respondent repeatedly suggests that *Griffin* identified constitutional *requirements* (including the participation of a probation officer) applicable to any warrantless search of a probationer. See Resp. Br. 14, 15, 17. That is incorrect. The *Griffin* Court did attach significance to the facts that the search in question was (1) conducted by a probation officer, (2) based on reasonable grounds to believe that a probation violation had occurred, and (3) conducted pursuant to a regulatory scheme that itself satisfied the Fourth Amendment's reasonableness requirement. *Griffin* did not, however, hold that any of those features of the Wisconsin scheme was a constitutional prerequisite to a valid warrantless search in the probation context.

In particular, to require that the search be conducted by an official having specific responsibility for the probationer's rehabilitation (see Resp. Br. 19-20) would substantially undermine the institution of summary probation under California law. "A person on summary probation in California is not under the direct supervision of a probation officer." Pet. App. 4a; see *People* v. *Soto*, 212 Cal. Rptr. 696, 699 n.3 (1985) (citation omitted) ("Summary probation * * *, wherein there is probation without any probation officer supervision, * * * entails the defendant reporting only to the court, usually where * * * he commits a subsequent offense."). By making respondent's release on probation contingent on his consent to future searches, the sentencing judge in the state case sought to ensure that respondent could be closely monitored so that "the community [would not be] harmed by the probationer's being at large." *Griffin*, 483 U.S. at 875. Because respondent's release on summary probation did not entail

supervision by a probation officer, the search condition had as a practical matter to be implemented by persons having more general law enforcement responsibilities. The practical result of respondent's position is that summary probation simply cannot operate in that manner; rather, States may authorize warrantless searches of probationers, even with their consent, only if specific officers are assigned to perform a rehabilitative role.

3. As the court of appeals recognized, respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a; see *id.* at 8a n.2; Gov't Br. 11-14. Thus, the question in this case is not whether the supervisory regime at issue here, which involves release into the community subject to close monitoring by law enforcement officers generally, may be imposed on a criminal defendant over his objection. Rather, the question is whether a defendant who is offered an alternative (confinement in a penal institution) that is unquestionably constitutional as a sanction for commission of a criminal act, but who chooses to accept release on probation subject to a search condition, may be held to the consequences of that choice. Nothing in *Griffin* suggests that the defendant's consent to search under those circumstances is invalid.

B. A Consent-Search Condition Does Not Conflict With "Special Needs" Analysis Generally

Apart from *Griffin*, respondent contends (Br. 23-26) that the government's position in this case, on a more general level, conflicts with this Court's "special needs" jurisprudence. Respondent argues that the Court has not analyzed those cases under the rubric of "consent," even though such cases frequently involve persons who become subject to "special needs" searches as a result of their voluntary participation in various endeavors.

The cases on which respondent relies, however, differ from this case in significant respects.

1. Respondent signed a written form by which he expressly "AGREE[D]" to "[s]ubmit his * * * person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer." J.A. 50. In light of respondent's explicit written consent, this case does not require the Court to determine whether or under what circumstances an individual may be deemed to have implicitly consented to search by engaging in specified conduct after receiving notice that those who participate in such conduct will be searched.

2. The plaintiffs in the cases on which respondent relies filed suit to challenge the government's authority to condition participation in various public programs on their exposure to searches. This Court understandably did not analyze their claims under the rubric of consent because those plaintiffs had specifically withheld their consent.[1] None of those cases involved a situation in which an individual who *had* consented to search sought to obtain suppression of the evidence that the search produced.

3. A probationer, like a parolee, enjoys only a "conditional liberty" rather than "the absolute liberty to which every citizen is entitled." *Griffin*, 483 U.S. at 874 (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)). The choice with which respondent was confronted—*i.e.*, selecting between consenting to future searches as a condition of probation on the one hand, or

[1] In *Ferguson* v. *City of Charleston*, 121 S. Ct. 1281 (2001), the question of consent was contested, but the Court decided the case on the premise that consent had not been given. See *id.* at 1288.

submitting to incarceration on the other—was the direct result of his conviction of a criminal act, for which the State might constitutionally have imprisoned him regardless of his preference. Although respondent's status as a probationer did not deprive him of all Fourth Amendment protections, see *id.* at 873, his diminished liberty interest is surely relevant to the constitutional analysis. The cases cited by respondent (see Br. 24-26) do not involve situations in which an individual's potential exposure to search resulted from his criminal conviction.

C. A Probationer's Consent Need Not Take The Form Of A Knowing And Intelligent Waiver In Order To Meet Fourth Amendment Standards

Respondent argues (Br. 26-40) that a criminal defendant's consent to a category of future searches is valid and enforceable only if it is knowing and intelligent under the standards set forth in *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938). Respondent contends that his agreement to submit to future searches does not constitute a valid consent because he was not specifically informed, at the time he signed the probation order, of his right to refuse consent. That claim lacks merit.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), this Court held that

> the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.

Id. at 227. In *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996), this Court reaffirmed the *Schneckloth* Court's rejection of the argument that a consent to search "could not be valid unless the defendant knew that he had a right to refuse the request."

Respondent acknowledges (Br. 30) that under *Schneckloth*, "the Fourth Amendment protection against warrantless searches could be lost through a defendant's voluntary consent to search, even without knowledge of the right to decline." He contends, however, that a different rule should apply where, as here, a defendant consents to a category of future searches as part of the disposition of a criminal charge. Respondent argues that "a formal agreement to relinquish Fourth Amendment rights in the future, * * * obtained by 'a trial judge in the structured atmosphere of a courtroom,' must comply with the *Johnson v. Zerbst* requirements." Resp. Br. 32 (quoting *Schneckloth*, 412 U.S. at 244).

The Court in *Schneckloth* did note the infeasibility of applying the *Johnson* v. *Zerbst* standard to the sort of fluid encounters that often precede consensual searches. See, *e.g.*, 412 U.S. at 245 ("It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*."). The principal thrust of the Court's analysis, however, was that the *Johnson* v. *Zerbst* standard was inapplicable to Fourth Amendment cases because that standard was designed to protect a different sort of constitutional right. The *Schneckloth* Court stated that "[o]ur cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection," *id.* at 235,

and explained that "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial," *id.* at 237. The Court concluded that

> [t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

Id. at 241.[2]

Schneckloth therefore does not support respondent's contention that the formal courtroom environment in which his consent to search was executed mandated an advisement of rights that is not required for consent searches generally. To the contrary, that courtroom setting, far from casting doubt on the voluntariness of respondent's consent to future searches, provides additional assurance that the consent was not the product of coercion or duress. The formal and public setting of

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[2] Indeed, even with respect to constitutional rights specific to the criminal trial process, no categorical rule mandates that a defendant must have knowledge of the right before he may validly relinquish it. In *United States* v. *Broce*, 488 U.S. 563, 573 (1989), for example, this Court noted that "[o]ur decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty." The Court then held that the plea in that case had relinquished a potential defense under the Double Jeopardy Clause of which the defendant had no knowledge. *Id.* at 572-574.

respondent's consent provides obvious protections against official pressure. Moreover, because respondent was sentenced to 90 days' imprisonment in addition to probation (see Gov't Br. 2 n.1), he was constitutionally entitled to be represented by counsel in connection with the state criminal charge. See *Argersinger* v. *Hamlin*, 407 U.S. 25, 37 (1972).

At the time of respondent's state conviction, the established rule of California law was that a criminal defendant may not be compelled to accept probation. See Gov't Br. 17. Although the record in this case does not reveal whether respondent's attorney in the state proceedings advised him of his right to decline probation, the circumstances surrounding respondent's consent to search make it more rather than less likely that the consent was the product of an uncoerced choice. If police officers in a street encounter are not required to inform the potential subject of a search of his right to refuse consent, there is no reason to impose such a requirement in a setting where the subject is afforded substantial alternative protections against the deprivation of Fourth Amendment rights.

D. Respondent's Consent Was Not Shown To Be Compelled By A Claim Of State Authority To Search

Much the same analysis applies to respondent's contention (Br. 36-40) that his signature on the probation form was not a "consent" to searches at all, but simply "acquiescence" to the State's claim of lawful authority to search. The form that respondent signed stated that he "AGREE[D] TO ABIDE BY" the conditions of probation, including the condition that his person and property were subject to search at any time. J.A. 50. Respondent's "AGREE[MENT]" arose out of a formal

judicial proceeding in which he was constitutionally entitled to representation by counsel, and prior decisions of the California Supreme Court had made clear that under state law a criminal defendant could not be sentenced to probation over his objection. Indeed, the court of appeals in this case, while holding that respondent's consent was invalid as applied to searches conducted for investigative purposes, recognized that respondent "did consent to searches when he agreed to the terms of his probation." Pet. App. 7a-8a.

This Court's decision in *Zap* v. *United States*, 328 U.S. 624 (1946), makes clear that an individual's consent to a category of future searches may be deemed valid and enforceable even when that consent is a required condition for receipt of a valuable government benefit (there, government contracts). See Gov't Br. 15-17. Contrary to respondent's suggestion (Br. 38-40), the decision in *Zap* did not turn on the commercial character of the property that was searched. Indeed, in subsequent cases involving residential or personal property, the Court has cited *Zap* as authority for the proposition that voluntary consent renders a search lawful. See *Schneckloth*, 412 U.S. at 219; *Texas* v. *Brown*, 460 U.S. 730, 736 (1983) (plurality opinion); Gov't Br. 17 n.7.[3]

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[3] Respondent also suggests (Br. 40 n.16) that *Zap* has been superseded by this Court's subsequent decision in *United States* v. *Biswell*, 406 U.S. 311, 315 (1972), which held that "[i]n the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute." *Biswell*, however, did not involve a situation where a business owner was required to execute an express contractual consent to future searches as a condition of a government benefit. Rather, the Court in *Biswell* simply addressed and rejected the suggestion

E. The Consent Given By Respondent Was Not An Unconstitutional Condition Of His Probation

"Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the" right whose waiver is at issue. *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994); see Gov't Br. 21-22. Respondent contends that the State of California may not, consistent with the unconstitutional conditions doctrine, make a criminal defendant's consent to future searches a prerequisite to release on probation. Respondent argues (Br. 40-44) that the condition is invalid because (1) no "essential nexus" exists between the condition and the State's interest in administering its probation system, and (2) there is no "rough proportionality" between the burden imposed on the probationer and the government interest that the search condition is intended to protect. Those arguments lack merit.

1. Respondent argues (Br. 42-43) that the requisite nexus between the search condition and the relevant state interest is lacking because "[u]nder *Griffin*, * * * a condition requiring a defendant to submit to non-probationary searches cannot be essentially connected to the state's interest in the operation of its probation

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that a business owner had consented to search by failing to resist a government agent who asserted a statutory right to inspect the premises. *Ibid.* Here, the government does not contend that respondent consented to the search of his apartment by declining to offer resistance at the time the search took place. Rather, the relevant consent occurred when respondent accepted release on probation and agreed to the search condition.

system." That argument lacks merit for the reasons stated at pages 2-4, *supra*. A search of a known probationer, intended to confirm or dispel a law enforcement officer's suspicion of new criminal conduct, is not properly characterized as a "non-probationary" search. Particularly under a probation scheme that does not involve supervision by a probation officer, the requirement that a defendant consent to search by law enforcement officers if he is to be released on probation bears a direct relationship to the State's interest in ensuring that probationers comply with the terms of their release so that "the probation serves as a period of genuine rehabilitation and * * * the community is not harmed by the probationer's being at large." *Griffin*, 483 U.S. at 875.

2. Assuming that some form of the "rough proportionality" test articulated in *Dolan* (512 U.S. at 391) extends beyond required dedications of real property interests and applies to unconstitutional-conditions claims generally, that test is satisfied here. "[I]t is the very assumption of the institution of probation that the probationer is in need of rehabilitation and is more likely than the ordinary citizen to violate the law." *Griffin*, 483 U.S. at 880. The probationer's knowledge that his person or property may be searched at any time can reasonably be expected to reduce the frequency of probation violations. See *id.* at 876 (imposition of warrant requirement for searches of probationers "would reduce the deterrent effect that the possibility of expeditious searches would otherwise create"). (That is so even assuming, *arguendo*, that indiscriminate or too-frequent searches might undermine the rehabilitative aspects of probation, see Resp. Br. 43 n.17.) And searches by law enforcement officers

can reveal the existence of probation violations that might otherwise have gone undetected.

The proportionality of the consent-search condition is also supported by the fact that if a prisoner chose incarceration rather than release on probation, he would be subject to wholly random searches in prison. An incarcerated prisoner has *no* expectation of privacy in his cell. See *Hudson* v. *Palmer*, 468 U.S. 517, 522-530 (1984). Thus, the consent-search condition does not involve an intrusion on privacy that deprives the defendant of a right he would otherwise enjoy if he elected to remain in prison. Accordingly, the requirement that a defendant consent to future searches in order to receive probation is proportionate both to the threat to public safety that the defendant's release may pose and to the limited privacy interests possessed by a convicted defendant whose alternative to probation is imprisonment.

Respondent contends (Br. 42) that "in the Fourth Amendment context, the inquiry under unconstitutional conditions would mirror the inquiry the Court currently performs under the 'special needs' analysis." While this Court has never so held, as a practical matter, the choice between the two approaches is unlikely to have outcome-determinative effects—and would not do so here—so long as respondent's right to refuse probation on the state charge is recognized as relevant to the "special needs" balancing. In *Vernonia School District 47J* v. *Acton*, 515 U.S. 646 (1995), for example, this Court employed "special needs" analysis in concluding that student athletes could constitutionally be required to undergo random drug testing as a condition of participation in interscholastic sports. *Id.* at 652-666. In concluding that such testing imposed no substantial intrusion on the students' legitimate privacy expecta-

tions, the Court relied in part on the diminished privacy expectations of elementary and secondary school students generally. See *id.* at 654-657. The Court also observed, however, that "[t]here is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id.* at 657. Similarly here, if this Court were to scrutinize the consent-search condition under the rubric of "special needs," respondent's right under California law to decline probation and to accept an unquestionably constitutional alternative sanction would be directly relevant to the Fourth Amendment analysis and would support the conclusion that the consent-search condition is reasonable.[4]

3. Respondent's reliance (Br. 43-44) on *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), is misplaced. The Court in *Murphy* suggested, though it did not squarely hold, that the government may not make release on probation contingent on an individual's willingness to forgo exercise of his Fifth Amendment privilege against self-incrimination (although the probationer's failure to provide required answers can support or contribute to a revocation of probation). See *id.* at 435 & n.7. Upholding the search condition here, however, does not imply

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[4] The likelihood that few defendants would prefer imprisonment to probation with a consent-search condition does not render the consent involuntary as a matter of law. See Gov't Br. 24. If the conditions of probation were made substantially more onerous, so that many defendants believed release on probation to be less desirable than incarceration, the constitutional relevance of the defendant's right to choose between the two sanctions would be apparent. The State does not negate the element of choice by making the terms of probation more favorable to the defendant.

that release on probation may be conditioned on a renunciation of any and all constitutional rights. See Gov't Br. 22. And there is no basis for respondent's effort to extrapolate any Fifth Amendment rule found in *Murphy* to the Fourth Amendment context presented here. The probationer in *Murphy* sought to assert a right (protection against compelled self-incrimination) that an incarcerated prisoner would retain. Here, by contrast, respondent, by agreeing to the consent-search condition, did not surrender any Fourth Amendment protection that he would have had if he had chosen (or California had imposed) the alternative sanction of imprisonment. See *Hudson* v. *Palmer*, *supra*.

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

SEPTEMBER 2001